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Ananthagopi Alaguganesan v Menteri Dalam Negeri & Ors

HIGH COURT (SEREMBAN) — CIVIL SUIT NO NA-21NCVC-16–12 OF 2020

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AZIZUL AZMI ADNAN J

6 AUGUST 2024

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Tort — Damages — Unlawful arrest and detention — Plaintiff charged under s 15(1)(c) of Immigration Act 1959/63 for offence of overstaying in Malaysia beyond validity period of his social visit pass — Whether arrest and detention of plaintiff were unlawful — Whether cause of action for misfeasance in public office was proven — Whether Government of Malaysia vicariously liable for acts of fifth defendant — Whether claim for damages ought to be allowed — Immigration Act 1959/63 s 15(1)(c)

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The plaintiff who was an Indian national arrived in Malaysia on 7 March 2020, just before the country went into lockdown due to the COVID-19 pandemic. He had a flight ticket to return to India on 23 March 2020 and had obtained a social visit pass, which was to expire on 13 August 2020. The plaintiff became stranded in Malaysia due to the imposition of the movement control orders ('MCO') that were intended to curb the spread of the coronavirus. On 19 March 2020, the Director General of the Department of Immigration issued the Exemption of Special Pass during the Movement Control Order ('the circular') in which the effect was that all foreigners who became stranded in Malaysia due to the imposition of the MCO could lawfully remain in Malaysia even though the validity of their immigration passes may have expired. On 10 October 2020, while the plaintiff was in his friend's ('PW1') house, he was arrested by the fifth defendant in connection with the alleged misappropriation and sale of a statue of a deity from a temple. Four police officers were present, all in plainclothes. The plaintiff was detained in police custody under s 51(5)(b) of the Immigration Act 1959/63 ('the Act') commencing from 10 October 2020. In the meantime, after learning that the plaintiff had been detained, PW2 had gone to the police station. PW2 was told to come back on Monday, 12 October 2020. PW2 then called PW1 who informed him that the plaintiff's sling bag containing the plaintiff's passport was in PW1's house. PW2 then went to PW1's house, where the sling bag was passed to him. On 12 October 2020, PW2 delivered the plaintiff's passport to the fifth defendant. Once the police received the plaintiff's passport and visa, checks were undertaken to ascertain the authenticity of those documents. On 20 October 2020, the police obtained confirmation that the plaintiff's passport and visa were genuine. On 22 October 2020, the plaintiff was brought before the magistrates court and charged under s 15(1)(c) of the Act for the offence of overstaying in Malaysia beyond the validity period of his social visit pass. The

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police later obtained confirmation regarding the validity and effect of the circular on 5 November 2020. The plaintiff was again brought before the magistrates court on 10 November 2020, whereupon he was released from custody. All told, the plaintiff had been detained for a period of approximately one month. The plaintiff claimed RM3m for damages against the defendants for unlawful arrest and detention and misfeasance in public office. The plaintiff testified that: (a) he had been dragged by a group of men from the house into a waiting car; (b) it was only in the car that he was informed by one of the men that they were police officers and the reasons for his arrest; and (c) they did not ask for his passport or personal details to verify his identity

Held, allowing the claim in part:

(1) The arrest and the detention of the plaintiff were unlawful for the following reasons: (a) the plaintiff was not informed at the time of his arrest of the grounds for his arrest and detention. The failure to do so amounted to a contravention of the constitutional protection accorded to the plaintiff under art 5(3) of the FC; (b) the failure to inform the plaintiff at the time he was apprehended had deprived the plaintiff an opportunity to retrieve his passport, which would have established that he had validly entered the country; and (c) the fifth defendant found it fit to exercise the power to arrest and detain the plaintiff in ignorance of the law. Despite having received confirmation that the passport and visa were genuine, and despite professing knowledge of the existence and effect of the circular at the time of the arrest, the fifth defendant not only did not release the plaintiff from custody but had proceeded to recommend that he be charged in contravention of s 15(1)(c) of the Act (see para 76).

(2) The general rule was that no claim for unlawful arrest or false imprisonment may be made in respect of the period of detention after the arrested person had been charged in court. An important exception to the general rule was that the shield accorded by s 32(1) of the Police Act 1967 may be vitiated where the police had failed to adhere to the requirements of law that had led or caused the remand order being issued by the court. The exception to the general rule did not apply, as the existence of the circular had been brought to the attention of the court. There was thus an intervening act in the chain of causation. While the plaintiff succeeded in establishing unlawful arrest and detention up to 22 October 2020, no liability laid with the fifth defendant in connection with the plaintiff's detention after that date (see paras 80–82).

(3) The cause of action for misfeasance in public office was not made out on the facts as the mens rea element was not proven. The contention of ulterior motive was not established. While the fifth defendant did not have a reasonable basis for holding the belief that an immigration offence had been committed, the facts did not prove that that belief was not

honestly held. Put another way, the element of mala fides was not established (see paras 83 & 85–87).

(4) The sixth defendant ie the Government of Malaysia was vicariously liable for the acts of the fifth defendant. There was no question that the fifth defendant was a police officer and hence the employment relationship with the government was proven. There was a sufficiently close connection between the position of the fifth defendant and the wrongful conduct that he had committed to make it just that the government be made liable for his acts. However, the case against the other defendants was dismissed (see paras 89, 91, 93 & 96).

(5) RM15,000 per day for the 12 days of unlawful detention was awarded as general damages payable. The total general damages payable was thus RM180,000. Additionally, the circumstances of the case sufficiently justified the award of exemplary damages. The arrest had not been effected on the basis of an innocent mistake, nor based upon an honest belief on reasonable grounds that an immigration offence had been committed. Exemplary damages was assessed at 25% of the restitutive damages awarded ie RM45,000, making the total damages payable to the plaintiff to be RM225,000 (see paras 99 & 103–105)

[Bahasa Malaysia summary

Plaintif yang merupakan warganegara India tiba di Malaysia pada 7 Mac 2020, sejurus sebelum negara ini melaksanakan sekatan pergerakan akibat pandemik COVID-19. Dia mempunyai tiket penerbangan untuk kembali ke India pada 23 Mac 2020 dan telah memperoleh pas lawatan sosial yang akan tamat pada 13 Ogos 2020. Plaintif terperangkap di Malaysia disebabkan pelaksanaan perintah kawalan pergerakan ('PKP') yang bertujuan untuk membendung penyebaran koronavirus. Pada 19 Mac 2020, Ketua Pengarah Jabatan Imigresen mengeluarkan Pengecualian Pas Khas semasa Perintah Kawalan Pergerakan ('pekeliling') di mana kesannya adalah semua warga asing yang terkandas di Malaysia akibat pelaksanaan PKP boleh terus berada secara sah di Malaysia walaupun tempoh sah pas imigresen mereka mungkin telah tamat. Pada 10 Oktober 2020, semasa plaintif berada di rumah rakannya ('PW1'), dia telah ditahan oleh defendan kelima berhubung dengan dakwaan penyalahgunaan dan penjualan patung dewa dari sebuah kuil. Empat orang pegawai polis hadir, semuanya berpakaian biasa. Plaintif ditahan dalam tahanan polis di bawah s 51(5)(b) Akta Imigresen 1959/63 ('Akta') bermula dari 10 Oktober 2020. Sementara itu, selepas mengetahui bahawa plaintif telah ditahan, PW2 telah pergi ke balai polis. PW2 diberitahu untuk datang semula pada Isnin, 12 Oktober 2020. PW2 kemudian menghubungi PW1 yang memaklumkan bahawa beg silang plaintif yang mengandungi pasport plaintif berada di rumah PW1. PW2 kemudiannya pergi ke rumah PW1, di mana beg silang tersebut diserahkan kepadanya. Pada 12 Oktober 2020, PW2 menyampaikan pasport plaintif kepada defendan kelima. Setelah polis

menerima pasport dan visa plaintif, pemeriksaan dilakukan untuk memastikan kesahihan dokumen-dokumen tersebut. Pada 20 Oktober 2020, polis memperoleh pengesahan bahawa pasport dan visa plaintif adalah tulen. Pada 22 Oktober 2020, plaintif dihadapkan ke mahkamah majistret dan didakwa di bawah s 15(1)(c) Akta kerana kesalahan melebihi tempoh yang sah dalam Malaysia melebihi tempoh sah pas lawatan sosialnya. Polis kemudian memperoleh pengesahan mengenai kesahihan dan kesan pekeliling pada 5 November 2020. Plaintif sekali lagi dibawa ke hadapan mahkamah majistret pada 10 November 2020, di mana dia dibebaskan dari tahanan. Keseluruhannya, plaintif telah ditahan selama kira-kira satu bulan. Plaintif menuntut RM3 juta sebagai ganti rugi terhadap defendan untuk tangkapan dan penahanan yang tidak sah serta salah laku dalam jawatan awam. Plaintif memberi keterangan bahawa: (a) dia telah diseret oleh sekumpulan lelaki dari rumah ke dalam sebuah kereta yang sedang menunggu; (b) hanya di dalam kereta dia diberitahu oleh salah seorang lelaki bahawa mereka adalah pegawai polis dan sebab tangkapannya; dan (c) mereka tidak meminta pasport atau butiran peribadinya untuk mengesahkan identitinya.

Diputuskan, membenarkan sebahagian tuntutan:

(1) Tangkapan dan penahanan plaintif adalah menyalahi undang-undang atas sebab-sebab berikut: (a) plaintif tidak dimaklumkan pada masa tangkapan tentang alasan untuk tangkapan dan penahanannya. Kegagalan untuk berbuat demikian melanggar perlindungan perlembagaan yang diberikan kepada plaintif di bawah perkara 5(3) Perlembagaan Persekutuan; (b) kegagalan untuk memaklumkan plaintif pada masa dia ditangkap telah menafikan peluang kepada plaintif untuk mengambil semula pasportnya, yang seharusnya menunjukkan bahawa dia telah masuk ke negara ini dengan sah; dan (c) defendan kelima telah mengambil keputusan untuk menggunakan kuasa tangkap dan tahan plaintif tanpa pengetahuan tentang undang-undang. Walaupun telah menerima pengesahan bahawa pasport dan visa adalah tulen, dan walaupun mengaku mengetahui tentang kewujudan dan kesan pekeliling pada masa tangkapan, defendan kelima bukan sahaja tidak membebaskan plaintif dari tahanan tetapi telah mencadangkan agar dia didakwa atas kesalahan melanggar s 15(1)(c) Akta (lihat perenggan 76).

(2) Peraturan umum adalah bahawa tiada tuntutan untuk tangkapan tidak sah atau penahanan palsu boleh dibuat mengenai tempoh penahanan selepas orang yang ditangkap telah didakwa di mahkamah. Satu pengecualian penting kepada peraturan umum ialah perisai yang diberikan oleh s 32(1) Akta Polis 1967 boleh dibatalkan jika polis gagal mematuhi kehendak undang-undang yang menyebabkan perintah reman dikeluarkan oleh mahkamah. Pengecualian kepada peraturan umum tidak terpakai, kerana kewujudan pekeliling telah dimaklumkan kepada mahkamah. Oleh itu, terdapat tindakan campur tangan dalam

rantaian sebab musabab. Walaupun plaintif berjaya membuktikan tangkapan dan penahanan yang tidak sah sehingga 22 Oktober 2020, tiada liabiliti yang dikenakan kepada defendan kelima berhubung dengan penahanan plaintif selepas tarikh tersebut (lihat perenggan 80–82).

(3) Kuasa tindakan untuk salah laku dalam jawatan awam tidak terbukti berdasarkan fakta kerana elemen mens rea tidak dibuktikan. Tuntutan motif tersembunyi tidak telah dibuktikan. Walaupun defendan kelima tidak mempunyai asas yang munasabah untuk mempercayai bahawa kesalahan imigresen telah dilakukan, fakta tidak membuktikan bahawa kepercayaan tersebut tidak dipegang dengan jujur. Dengan kata lain, elemen mala fide tidak terbukti (lihat perenggan 83 & 85–87).

(4) Defendan keenam iaitu Kerajaan Malaysia bertanggungjawab secara vikarius atas tindakan defendan kelima. Tidak ada keraguan bahawa defendan kelima adalah seorang pegawai polis dan oleh itu hubungan pekerjaan dengan kerajaan telah dibuktikan. Terdapat hubungan yang cukup dekat antara kedudukan defendan kelima dan salah laku yang dilakukan olehnya sehingga wajar kerajaan dikenakan liabiliti atas tindakannya. Walau bagaimanapun, kes terhadap defendan-defendan lain telah ditolak (lihat perenggan 89, 91, 93 & 96).

(5) RM15,000 sehari untuk 12 hari penahanan yang menyalahi undang-undang telah dianugerahkan sebagai ganti rugi am yang perlu dibayar. Jumlah ganti rugi am yang perlu dibayar adalah RM180,000. Selain itu, keadaan kes ini cukup mewajarkan pemberian ganti rugi teladan. Tangkapan tidak dilaksanakan atas dasar kesilapan yang tidak bersalah, mahupun berdasarkan kepercayaan jujur yang berasaskan alasan yang munasabah bahawa kesalahan imigresen telah dilakukan. Ganti rugi teladan dinilai pada 25% daripada ganti rugi restitutif yang dianugerahkan iaitu RM45,000, menjadikan jumlah ganti rugi yang perlu dibayar kepada plaintif sebanyak RM225,000 (lihat perenggan 99 & 103–105).]

Cases referred to

Azrul Hardav bin Abdullah v Norazman bin Mat Zim (WA-21NCVC-131–12 of 2017) (unreported) (refd)

Chong Fook Kam & Anor v Shaaban & Ors [1968] 2 MLJ 50, FC (refd)

Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal [2018] 3 MLJ 281; [2018] 1 AMR 209; [2018] 3 CLJ 427; [2018] 1 MLRA 535, FC (refd)

GMP Kaisar Security (M) Sdn Bhd v Mohamad Amirul Amin bin Mohamed Amir [2022] 6 MLJ 369; [2022] 10 CLJ 669, CA (refd)

Hassan bin Marsom & Ors v Mohd Hady bin Ya'akop [2018] MLJU 1294; [2018] 7 CLJ 403, FC (refd)

Kerajaan Malaysia & Ors v Lay Kee Tee & Ors [2009] 1 MLJ 1; [2009] 1 CLJ 663, FC (refd)
Masa ak Nangkai & Ors v Sgt Edwin Nancha & Anor [2005] 1 MLJ 581; [2004] 6 AMR 548, HC (refd)
N Indra a/p Nallathamby (administratrix of the estate and dependant of Kugan a/l Ananthan, deceased) v Datuk Seri Khalid bin Abu Bakar & Ors [2014] 8 MLJ 625; [2013] 6 CLJ 272, HC (refd)
Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)
Ramly & Ors v Jaffar [1968] 1 MLJ 209, FC (refd)
Rookes v Barnard [1964] AC 1129, HL (refd)
Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal [2018] 1 MLJ 784, CA (refd)
Shaaban & Ors v Chong Fook Kam & Anor [1969] 2 MLJ 219, PC (refd)
Sin Heap Lee-Marubeni Sdn Bhd v Yip Shou Shan [2005] 1 MLJ 515, CA (folld)
South Bucks District Council v Porter; Chichester District Council v Searle and others; Wrexham County Borough Council v Berry [2003] 3 All ER 1, HL (refd)
Zaidah bt Ismail v Inspektor Rabiatul Adawiayah bt Mohd Noor & Ors and another appeal [2021] MLJU 2109; [2021] 10 CLJ 876, CA (refd)
Zulkiflee SM Anwar Ulhaque v Arikrishna Apparau [2012] CLJU 1344, HC (refd)

Legislation referred to

Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 s 13
Courts of Judicature Act 1964 s 14
Criminal Procedure Code ss 23(1)(a), 28, 117, 119
Federal Constitution arts 5, 5(1), (3), 6, 7, 8, 11, 13
Immigration Act 1959/63 ss 6(1)(c), 15(1)(c), 51(3)(a), (5)(b)
Penal Code ss 321, 420
Police Act 1967 s 32(1)

Karthigesan Shanmugam (with K Kanagavalli and AR Thamayanty) (Karthig Shan) for the plaintiff.
Amalina bt Zainal Mokhtar (Senior Federal Counsel, Attorney General's Chambers) for the defendants.

Azizul Azmi Adnan J:

INTRODUCTION

[1] The plaintiff in this case, Mr Ananthagopi Alaguganesan is an Indian national. He claimed he was unlawfully detained by the fifth defendant,

Inspector Jeinthan Annanthakirishnan, an investigating officer with the Royal Malaysian Police.

[2] After a full trial of the action, I allowed the plaintiff's claim in part. The reasons for my decision are set out here.

MATERIAL FACTS

[3] The plaintiff arrived in Malaysia on 7 March 2020, just before the country went into lockdown due to the COVID-19 pandemic. He had a flight ticket to return to India on 23 March 2020. The plaintiff had obtained a social visit pass, which was to expire on 13 August 2020.

[4] As events turned out, the plaintiff became stranded in Malaysia due to the imposition of movement controls that were intended to curb the spread of the coronavirus.

[5] It was common ground between the parties that on 19 March 2020, the Director General of the Department of Immigration issued a document entitled *Exemption of Special Pass during Movement Control Order ('MCO')*. The material portion of this circular read as follows:

> Reference is made to the current Movement Control Order (MCO) declared in Malaysia recently,
>
> 2. In view of the current situation, all foreigners in Malaysia whose pass expired *DURING THIS (MCO) PERIOD ONLY*, may leave Malaysia without any Special Pass provided they possess a valid Passport. This is effective today until further notice.

[6] The effect of this letter was that all foreigners who became stranded in Malaysia due to the imposition of movement control orders could lawfully remain in Malaysia even though the validity period of their immigration passes may have expired.

The arrest of the plaintiff

[7] On 10 October 2020 at about 11.55pm, while the plaintiff was in his friend's house in Port Dickson, he was arrested by Inspector Jeinthan ('the fifth defendant') in connection with the alleged misappropriation and sale of a statue of a deity from the Sri Balatandayuthabani temple in Rantau. Four police officers were present, all in plainclothes. They were Corporal Saupi bin Said, Inspector Jeintan, Inspector Roheswaran ('DW1') and Corporal Adi. Corporal Saupi was present when Inspector Jeinthan effected the arrest of the

plaintiff. The other two officers were not, because they were guarding the rear entrance of the house. Of the four officers, only Inspector Jeinthan and Inspector Roheswaran testified at trial.

[8] The facts thus far narrated were not in material dispute. However, the witnesses for the plaintiff and those for the defence put forth markedly contrasting versions of the events regarding the precise circumstances of the plaintiff's arrest.

[9] The plaintiff testified that he had been dragged by a group of men from the house into a waiting car. His testimony at trial was that it was only in the car that he was informed by one of the men of Indian descent that they were police officers. The plaintiff further testified that they did not ask for his passport or personal details to verify his identity. According to the plaintiff, he was only told of the reasons for his arrest when he was in the car. He was then brought to Ibu Pejabat Polis Kontinjen Negeri Sembilan in Seremban.

[10] The owner of the house where the plaintiff was arrested was Mr Mahendran Vellasamy ('PW1'), who was an oil and gas technician. His testimony at trial corroborated that of the plaintiff, which was that the police had not asked for the plaintiff's identification documents at the time they dragged him out of the house.

[11] Mr Mahendran testified that one of the men had asked the plaintiff whether he was Gobi and then dragged him out. According to Mr Mahendran, none of the men provided identification or even identified themselves as the police.

[12] Mr Mahendran testified that the plaintiff's passport was in a sling bag beside the chair on which the plaintiff was sitting at the material time. His testimony in this regard was not challenged in cross-examination. After what he perceived as the abduction of the plaintiff, Mr Mahendran called Dato' Natarajen Manohran ('PW2') and told him what had happened. Dato' Natarajen told him to go to the Port Dickson police station, where he would be met by Dato' Satishkumar ('PW3').

[13] As explained, the defence put forth a very different picture of what had happened during the arrest of the plaintiff. The following paras 14 to 17 set out the contended facts as narrated by the witnesses of the defence.

[14] According to the defence, Inspector Jeinthan had found the front door of the house open, introduced himself to the owner of the house ('Mr Mahendran') as a police officer and had shown him his police authority card. Inspector Jienthan then asked Mr Mahendran to call the plaintiff out.

According Inspector Jeinthan, when the plaintiff presented himself, Inspector Jeinthan again introduced himself as a police officer and showed the plaintiff his authority card. Inspector Jeinthan further testified that he had requested the plaintiff to produce identification or valid travel documents, but the plaintiff had failed to do so. According to Inspector Jeinthan's testimony at trial, the plaintiff merely showed a photograph of his passport on his mobile phone. When asked whether he possessed a valid visa, the plaintiff informed Inspector Jeinthan that his social visit pass had lapsed, which prompted his arrest. The following is the relevant excerpt from Inspector Jeinthan's testimony in his witness statement:

> v. Kemudian, saya menanyakan adakah kamu mempunyai visa. Dia memberitahu bahawa visanya telah tamat tempoh. Oleh kerana dia gagal menunjukkan dokumen yang sah, maka saya telah melakukan tangkapan bersabit repot Rantau 1075/2020 seksyen 406 KK /6(1)(c) Akta Imigresen di mana Pegawai Penyiasat pada ketika itu adalah Insp Roheswaran.
>
> vi. Satu laporan polis iaitu repot tangkap Port Dickson 4638/20 telah dibuat oleh saya pada 11.10.2020 jam 0135hrs.

[15] In actual fact there was nothing in either police report regarding any contravention of the Immigration Act 1959/63. The first police report bearing the reference Rantau 1075/2020 was made on 15 August 2020 regarding the alleged sale of the deity statue, and thus had nothing to do with the arrest of the plaintiff. The other report bearing the reference Port Dickson 4638/20 made reference to the offence of cheating under s 420 of the Penal Code but did not mention contravention of the Immigration Act 1959/63.

[16] It was only on 27 October 2020 that Inspector Jeinthan made a corrective report, making reference to s 6(1)(c) of the Immigration Act 1959/63, which prohibits a non-citizen from entering Malaysia without a valid pass. In re-examination, he tried to explain this discrepancy by the fact that he was very tired when he made the report in the early hours of 11 October 2020 (see p 166 of the notes of evidence (NOE)). Nothing, however, turns on this point, as the plaintiff himself testified that he had been told while he was in the police car that he had been arrested in connection with the misappropriation of the statue of the deity and because his social visit pass had expired.

[17] It will be recalled that Inspector Roheswaran Ganesan ('DW1') was one of the four policemen who had gone to Mr Mahendran's house in Port Dickson. According to the testimony of Inspector Roheswaran at trial, he was guarding the rear entrance of the house at the time of the plaintiff's arrest, and therefore was unable to testify whether Inspector Jeinthan introduced himself as a police officer or whether he showed his authority card. Under cross-examination, Inspector Roheswaran conceded that, contrary to what was stated in his witness statement, he did not witness Inspector Jeinthan

requesting for the plaintiff's identification, and that he did not in fact witness the purported refusal by the plaintiff to accede to Inspector Jeinthan's request (see NOE/94).

[18] The only other police officer who was present at the time of the plaintiff's arrest was Corporal Saupi bin Said. He was not called to testify at trial.

The findings of fact by the court regarding the circumstances of the plaintiff's arrest

[19] The testimony of Mr Mahendran Vellasamy ('PW1') to the effect that the plaintiff's passport was in sling bag placed beside the chair that the plaintiff had been sitting on in Mr Mahendran's house was not challenged in cross-examination by the defence. Therefore Mr Mahendran's testimony in this regard must be taken to be representative of the truth.

[20] In my considered view, it was extremely unlikely that a person in the position of the plaintiff when asked by persons who had identified themselves as police personnel would openly defy the police request to provide identification documents, when those documents were within easy reach. A reasonable response would have been to inform the police his name and to retrieve the passport that was in the sling bag that had been placed beside the chair in the living room of Mr Mahendran's house. It was thus more likely that in fact the plaintiff had not been given any opportunity to retrieve his identification documents before he was bundled into the unmarked police car.

[21] The testimonies of PW1 and the plaintiff were also in accord with one another. By contrast, the version of events put forth by the defence relied on the uncorroborated testimony of Inspector Jeintan. Inspector Roheswaran had not been present in the house when the plaintiff was arrested, and therefore could not bear witness to the events that occurred in the house (despite the contents of his witness statement, which he readily recanted under cross-examination). The only other police officer who was present with Inspector Jeintan was not called to testify.

[22] Considering all the circumstances of the case and having seen the testimonies of the witnesses, I was of the view that the version of events as testified by the plaintiff and Mr Mahendran was more representative of the truth.

At the Port Dickson police station

[23] It will be recalled that shortly after the plaintiff was taken away, Mr Mahendran had made a telephone call to Dato' Natarajen Manohran. He

then made his way to the Port Dickson police station, as directed by Dato' Natarajen. He arrived at the station at 12.25am on 11 October 2020, where he was met by Dato' Satishkumar Manohran (PW3), who was Dato' Natarajen's brother. PW3 testified he had gone to the Port Dickson police station to report what they believed was the abduction of the plaintiff. The police officer at the Port Dickson police station however told PW3 to be patient, as he wanted to see if the police information systems recorded the arrest of the plaintiff. They remained at the Port Dickson police station until they were told at about 2.20am that the plaintiff had been detained by the police and was being held in Seremban. Because of this, Mr Mahendran and Dato' Satishkumar did not proceed with the police report (on the basis that the plaintiff had been detained by the police).

[24] Mr Mahendran testified that he returned home thereafter. He met Dato' Natarajen at his home, and passed to him the plaintiff's sling bag containing his passport about at 3am on 11 October 2020.

At IPK Seremban

[25] In the meantime, after Dato' Natarajen ('PW2') had learnt that the plaintiff had been detained at the Police Contingent Headquarters in Seremban ('IPK Seremban'), he had gone to IPK Seremban in the early hours of the same day. There, he was informed by Inspector Roheswaran that the plaintiff had been detained by Inspector Jeinthan. PW2 testified that Inspector Roheswaran then called Inspector Jeinthan in his presence. Inspector Roheswaran informed Dato' Natarajen that Inspector Jeinthan had conveyed a message for him to come back on Monday, 12 October 2020.

[26] Dato' Natarajen then called Mr Mahendran, who informed him that the plaintiff's sling bag containing the plaintiff's passort was in his house. Dato' Natarajen then went to Mr Mahendran's house, where the sling bag was passed to him.

The plaintiff's travel documents

[27] At about 10am on Sunday, Dato' Natarajen called Inspector Jeinthan, informing the latter that the plaintiff's travel documents were with him and asking if he could pass them to Inspector Jeinthan. Inspector Jeinthan replied that he was tired and asked Dato' Natarajen to go to IPK Seremban on Monday.

[28] On Monday, 12 October 2020, Dato' Natarajen delivered the plaintiff's passport to Inspector Jeinthan. Dato' Natarajen also testified that he had also passed to Inspector Jeinthan a copy of the 19 March 2020 Immigration

Department circular. This was however denied at trial by Inspector Jeinthan. It was not explained where Dato' Natarajen had obtained the copy of the Immigration Department circular and whether it was found in the plaintiff's sling bag together with the plaintiff's passport. However, as we shall see, nothing turns on this.

[29] Once the police received the plaintiff's passport and visa, checks were undertaken to ascertain the authenticity of those documents. On 20 October 2020, the police obtained confirmation from the Immigration Forensic Centre of the Malaysian Immigration Academy that the plaintiff's passport and visa were genuine.

The allegation of assault

[30] The plaintiff alleged that he was the victim of sexual assault while he was in detention. I dismissed these allegations as I was of the view that the facts established at trial did not support any finding of assault or battery. The plaintiff has not appealed against this determination, and accordingly these grounds of judgment will not address the allegations of assault.

Charged at the magistrates court

[31] The plaintiff was detained in police custody under s 51(5)(b) of the Immigration Act 1959/63 commencing from 10 October 2020.

[32] On 22 October 2020, the plaintiff was brought before the magistrates court and charged under s 15(1)(c) of the Immigration Act 1959/63 for the offence of overstaying in Malaysia beyond the validity period of his social visit pass. This was despite the fact that it was established that the plaintiff's travel documents were genuine. This was because — according to the defence — the plaintiff was only permitted to remain in Malaysia until 13 August 2020 by the terms of the social visit pass issued to him.

[33] Before the magistrate, the plaintiff pleaded not guilty. Bail was rejected.

[34] Lawyers acting for the plaintiff provided to the court a copy of the 19 March 2020 Immigration Department circular, which, it will be recalled, permitted foreign nationals to remain in Malaysia beyond the validity period of their immigration passes during the period when movement control orders were in force. The magistrate directed the prosecution to confirm the status of the circular.

Release from custody

A **[35]** The police obtained confirmation regarding the validity and effect of the 19 March 2020 Immigration Department circular on 5 November 2020. The plaintiff was again brought before the magistrates court on 10 November 2020, whereupon he was released from custody.

B **[36]** All told, the plaintiff had been detained for a period of approximately one calendar month. From his arrest, he remained in police custody for 12 days before he was charged. He was detained for a further 18 days before his release.

ISSUES AND THE DECISION OF THE COURT

C

[37] The plaintiff advanced the case that he had been unlawfully arrested and detained. Arguments were also advanced for the cause of action of misfeasance in public office. The plaintiff claimed RM3m as damages.

D **[38]** The defence resisted the plaintiff's claim primarily on the facts.

[39] After a full trial of the action, this court allowed the plaintiff's claim in part and ordered Inspector Jeinthan and the government of Malaysia to pay **E** RM180,000 as general damages for the unlawful detention of the plaintiff, RM45,000 as exemplary damages and a further sum of RM30,000 as costs. The case against the other defendants was dismissed.

[40] In paras 42 to 72 post, I deal with the applicable principles of law **F** relating to the powers of arrest under the Criminal Procedure Code and under the Immigration Act 1959/63. These paragraphs also deal with the effect on the unlawful detention of an arrested person of a remand order issued by a magistrate.

G **[41]** In paras 73 to 106 post, the principles of law are applied to the facts of the case.

THE APPLICABLE PRINCIPLES

H **[42]** An individual's right of personal liberty is a constitutionally-guaranteed right under art 5 of the Federal Constitution. The provisions of arts 5, 6, 7, 8, 11 and 13 of Federal Constitution pertaining to fundamental liberties enures for the benefit all persons, and not just citizens of Malaysia. As such, the right of the plaintiff, an Indian national, to personal liberty is one that is protected **I** under our Constitution.

[43] Article 5(1) provides that any deprivation of personal liberty must be in accordance with the law. Under art 5(3), an arrested person must be informed as soon as may be of the grounds of his arrest. An arresting officer is not

required to specify a particular crime or to give a technical definition of the offence; it will be sufficient if the police officer informs the person being arrested of the offence or the type of offence for which he was being arrested, using commonplace language: see *Zulkiflee SM Anwar Ulhaque v Arikrishna Apparau* [2012] CLJU 1344.

Arrest under the CPC

[44] Section 23(1)(a) of the Criminal Procedure Code prescribes the circumstances under which a person may be arrested without a warrant of arrest. It reads as follows:

> Section 23 *When police or penghulu may arrest without warrant.*
>
> (1) Any police officer or penghulu may without an order from a Magistrate and without a warrant arrest —
>
> (a) any person who has been concerned in any offence committed anywhere in Malaysia which is a seizable offence under any law in force in that part of Malaysia in which it was committed or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned;

[45] The Federal Court in *Chong Fook Kam & Anor v Shaaban & Ors* [1968] 2 MLJ 50 explained the four discrete scenarios in which an arrest may be made without a warrant:

> Any police officer may without an order from a magistrate and without warrant arrest —
>
> (a) any person who has been concerned in any seizable offence;
>
> (b) any person against whom a reasonable complaint has been made that he was concerned in a seizable offence;
>
> (c) any person against whom credible information has been received of his having been concerned in a seizable offence;
>
> (d) any person against whom a reasonable suspicion exists of his having been concerned in a seizable offence.

[46] It is pertinent to observe that although the respondents in that case proceeded to further appeal to the Judicial Committee of the Privy Council, the decision of the Federal Court on the construction s 23(1)(a) was not disturbed in the further appeal.

[47] It is well established that the police may only rely on s 23(1)(a) of the Criminal Procedure Code if they can show that they had reasonable and probable cause to effect the arrest, in that the police received credible information or held reasonable suspicion that the person in question was

concerned in a seizable offence: see *Masa ak Nangkai & Ors v Sgt Edwin Nancha & Anor* [2005] 1 MLJ 581; [2004] 6 AMR 548, cited with approval by the Federal Court in *Hassan bin Marsom & Ors v Mohd Hady bin Ya'akop* [2018] MLJU 1294; [2018] 7 CLJ 403. Whether or not there was reasonable and probable cause must be determined objectively by the court based on the evidence before it: *Ramly & Ors v Jaffar* [1968] 1 MLJ 209 (FC).

[48] 'Reasonable suspicion' does not equate to prima facie proof. It is something less. Lord Devlin, delivering the decision of the Privy Council in *Shaaban & Ors v Chong Fook Kam & Anor* [1969] 2 MLJ 219 explained the distinction in the following terms:

> Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove'. Suspicion arises at or near the starting point of an investigation, of which the obtaining of prima facie proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage. It is indeed desirable as a general rule that an arrest should not be made until the case is complete. But if arrest before that is forbidden, it could seriously hamper the police. To give power of arrest on reasonable suspicion does not mean that it is always or even ordinarily to be exercised. It means that there is an executive discretion ...

[49] It would be instructive to examine the circumstances of cases where the courts have come to the conclusion that an arrest had been effected unlawfully.

[50] In *Shaaban v Chong Fook Kam,* two police officers arrested a lorry driver and its attendant (the plaintiffs in the original action) in connection with the offences of manslaughter and causing death by dangerous or reckless driving. The complainant stated in his police report that he was passing the plaintiffs' lorry, which was loaded with timber and which was travelling in the opposite direction, when a piece of lumber fell off the lorry, striking dead a passenger in the complainant's car.

[51] At first instance, Raja Azlan Shah J found that the contention of wrongful arrest had not been made out. The Federal Court reversed this finding, holding that although there may have been reasonable suspicion that the plaintiffs' lorry was the lorry that had been involved in the accident, the information that the police had at the material time did not implicate the plaintiffs regarding the offences of manslaughter or dangerous or reckless driving. In the further appeal, the Privy Council agreed that there had been wrongful arrests of the plaintiffs, but found that it was not necessary for the police to have prima facie proof of the involvement of the arrested persons in the seizable offence that was the subject of the initial complaint.

[52] Three key observations of general application may be made from that case:

(a) first, the evidential burden to show reasonable and probable cause lies with the police;

(b) second, whether or not there had existed reasonable suspicion of the detained person's involvement in a seizable offence is to be determined objectively by the court, having regard to the information available to the police at the time of the arrest; and

(c) third and no less importantly, the reasonable suspicion must relate to the offence for which the detained person had been arrested. On the facts of that case, although there was reasonable suspicion that the plaintiffs' lorry had been involved in the accident and that the timber that had caused the fatality had fallen off their lorry, there was no reasonable suspicion of the plaintiffs' culpability for manslaughter or for dangerous or reckless driving.

[53] The last of the three points above was underscored in the more recent case of *Zaidah bt Ismail v Inspektor Rabiatul Adawiayah bt Mohd Noor & Ors and another appeal* [2021] MLJU 2109; [2021] 10 CLJ 876 ('the CA'). The first plaintiff in that case ran a business manufacturing songket in Terengganu. She employed a worker named Budi Hermawan, who was an Indonesian national. Budi made a police report on 6 April 2013, the gist of which was that he and four other workers had been beaten by the second plaintiff, who was the younger brother of the first plaintiff. It was also alleged that their salary had been withheld. The first plaintiff was arrested two days later, on suspicion of having committed an offence under s 13 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007. However, Budi had entered the country legally and was in possession of the necessary work permit and other travel documentation. The Court of Appeal held:

> In the circumstances, the first defendant being the investigating officer ought to have objectively analysed the facts to make a proper and valid judgment that it was unnecessary to arrest and detained the first plaintiff. However, the first defendant had failed to do so, resulting in the unlawful arrest and detention of the first plaintiff. We find that there were no credible information before the first defendant for any reasonable suspicion to arise that the first plaintiff had committed a seizable offence under ATIPSOM, or for that matter under any other statute. Budi was legally in the country with full and valid documents of employment by the first plaintiff. Therefore, it begs the question how the first defendant could have deduced that Budi a person who had been trafficked into the country and thus be an offence for which the powers of arrest under s 29 of the Act 670 or s 23 of the Criminal Procedure Code can be exercised. The complaint of alleged assault was made by Budi was against the second plaintiff, and that too is a non-seizable offence. We find that no reasonable complaint has been made or credible information has been

received or a reasonable suspicion exists for the first plaintiff to be arrested and detained in respect of a seizable offence.

[54] Thus, while the first information report may have contained credible information regarding an offence of voluntarily causing hurt under s 321 of the Penal Code, that offence was not a seizable offence. In any event, the complaint of battery was against the second plaintiff, and there was no suggestion at all that the first plaintiff was involved in beating Budi or any other worker. There thus could not have been any reasonable suspicion of the first plaintiff being concerned with the offence for which she had been arrested.

[55] Under s 28 of the Criminal Procedure Code, a person who has been arrested without a warrant must be brought before a magistrate within 24 hours of his arrest. In the present case, the plaintiff was only brought before a magistrate on the twelfth day following his arrest.

[56] This was explained by the fact that the arrest of the plaintiff was effected under the Immigration Act 1959/63, which permits the detention of non-citizens for 14 days before the non-citizen must be brought before a magistrate. This is discussed in the following paragraphs.

Arrest under the Immigration Act 1959/63

[57] The power of arrest under the Immigration Act 1959/63 is provided under s 51(3)(a), which reads as follows:

> (3)(a) Any police officer, immigration officer or Customs Officer may arrest without warrant any person who he reasonably believes has committed an offence against this Act.

[58] There is a notable difference in the words employed in s 51(3)(a), compared to those in s 23(1)(a) of the Criminal Procedure Code. Under the Immigration Act 1959/63, a police officer may arrest any person without a warrant if 'he reasonably believes' that that person has committed an offence under the Immigration Act 1959/63. By contrast, under the Criminal Procedure Code, an arrest without warrant may be effect if 'a reasonable suspicion exists' that the person to be arrested was concerned in a seizable offence.

[59] In my considered view, the formulation of words suggests that the applicable test under s 51(3)(a) of the Immigration Act 1959/63 is a subjective rather than objective one. What matters is that the arresting officer had an honest belief that an immigration offence has been committed. Nonetheless, the inclusion of the word 'reasonably' must mean that there is still an element

of objectivity: there must be a reasonable basis for the arresting officer to hold such belief.

[60] In my considered view, the onus of proving that the arresting officer held an honest belief that an immigration offence has been committed and that there was a reasonable basis for him to have held that belief, must lie with the arresting officer. This would be consistent with the position under the Criminal Procedure Code.

[61] As alluded to above, a non-citizen detained under a power exercised pursuant to the Immigration Act 1959/63 must be produced before a magistrate within 14 days of his arrest. This is provided for in s 51(5)(b), the material portion of which is reproduced below:

> (5) Notwithstanding anything contained in this Act or in any subsidiary legislation made under this Act —
>
> ...
>
> (b) where *any person other than a citizen is arrested or detained under this Act*, whether for an offence against this Act or otherwise than for such offence, and has not been earlier released, or charged in court for an offence against this Act, or removed from Malaysia under this Act, *he shall, within fourteen days of his arrest or detention, be produced before a Magistrate* who shall make an order for his detention for such period as may be required by an immigration officer or a police officer for the purpose of investigations into an offence against this Act, or by an immigration officer for the purpose of either making inquiries, or effecting his removal from Malaysia, under this Act,
>
> and any provision of this Act or any subsidiary legislation made under this Act providing for the arrest or detention, otherwise than for an offence, of a person who is a citizen, or for the arrest or detention of a person other than a citizen, whether for an offence against this Act or otherwise than for such offence, shall be read as being subject to the provisions of paragraph (a) or (b), as may be applicable:
>
> Provided that the Magistrate before whom such person is produced under paragraph (a) or (b), as the case may be, shall not authorize or order the detention of such person for a period in excess of the maximum period which may be specified in the provision under which he is to be detained. (Emphasis added).

[62] On the facts of the present case, the plaintiff was brought before the magistrate before the expiry of the period prescribed under s 51(5)(b) of the Immigration Act 1959/63.

Detention by order of magistrate

[63] The undisputed facts of the present case were that the plaintiff was detained in police custody for 12 days before he was charged. After he was charged, he was detained for a further 18 days under a remand order before his release.

[64] As a general rule, no claim for unlawful arrest or false imprisonment may be made in respect of the period of detention after the arrested person has been charged in court. The authority for this proposition is the decision of the Federal Court in *Chong Fook Kam v Shaaban.* However, as we shall see, there is an important exception to this general rule.

[65] There are two reasons for the general rule. The first is that the law provides for the immunity of judges and persons acting in a judicial capacity. The second is s 32(1) of the Police Act 1967, which shields a police officer from liability in circumstances where the detention is carried out in compliance with an order of court. A police officer may not, however, avail himself of the protection of s 32(1) where the order of court detaining the arrested person had been procured through a disobedience of the applicable provisions of law on the part of the officer in question.

[66] In the case of *Chong Fook Kam v Shaaban,* the Federal Court expressed the view that an order of detention authorised by a magistrate is a judicial act and cannot form the basis for a claim for damages against the magistrate. The reason for this is the immunity accorded by s 14 of the Courts of Judicature Act 1964 to judges and other persons acting in a judicial capacity. Plainly, this immunity does not extend to police officers. Nor does the decision of the Federal Court in *Chong Fook Kam v Shaaban* so extend the scope of such immunity.

[67] In as far as the liability of the police is concerned, as explained, s 32(1) of the Police Act 1967 shields a police officer from liability if the detention was carried out by the officer in compliance with an order from a magistrate. Section 32(1) reads as follows:

> (1) Where the defence to any suit instituted against a police officer, an extra police officer, volunteer reserve police officer or an auxiliary police officer is that the act complained of was done in obedience to a warrant purporting to be issued by any competent authority, the court shall, upon production of the warrant containing the signature of such authority and upon proof that the act complained of was done in obedience to such warrant, enter judgment in favour of such police officer, extra police officer, volunteer reserve police officer or auxiliary police officer.

[68] The two operating principles were explained in *Chong Fook Kam v Shaaban* by Suffian FCJ in the following terms:

> An order of a magistrate authorising the detention of the arrested person beyond the

period of 24 hours made under s 117 is a judicial act and cannot found a claim for damages against the magistrate because of s 107(1) of the Courts Ordinance 1948, which reads:

> No ... Magistrate or other person acting judicially shall be liable to be sued in any civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of.

Nor may such an order found a claim for damages against a police officer because s 41(1) of the Police Ordinance No 14 of 1952 (now s 32(1) of the new Police Act No 41 of 1967) provided:

> Where the defence to any suit instituted against a police officer is that the act complained of was in obedience to a warrant purporting to be issued by any competent authority, the Court shall, upon production of the warrant containing the signature of such authority and upon proof that the act complained of was done in obedience to such warrant, enter judgment in favour of such police officer.

In view of these provisions, counsel for the plaintiffs was right in not claiming damages in respect of the detention following the magistrate's detention order.

[69] The Federal Court case of *Hassan bin Marsom & Ors v Mohd Hady bin Ya'akop* [2018] MLJU 1294; [2018] 7 CLJ 403 established that the shield accorded by s 32(1) of the Police Act 1967 is not absolute, and may be vitiated where the police had failed to adhere to the requirements of ss 117 and 119 of the Criminal Procedure Code, which requires that copies of the police diary (which sets out, among others, a statement of the circumstances ascertained through the investigations of the police) be transmitted to the magistrate.

[70] On the facts of that case, the Federal Court found that not only had there been non-compliance with the requirements of ss 117 and 119 when the police applied for an extension of the remand order of the plaintiff in that case, but also there had been a dereliction of duty bordering on gross irresponsibility on the part of the police officers who had applied for the extension of the remand order. The plaintiff in that case had been detained for purported involvement in a fight, but by the time the police applied for an extension of the order for his remand, the police had in fact verified and confirmed the plaintiff's story that he was not at the scene of the fight at the material time.

[71] The Federal Court in that case affirmed the decision of the Court of Appeal, which had departed from the earlier decisions in *Chong Fook Kam v Shaaban* and *N Indra a/p Nallathamby (administratrix of the estate and dependant of Kugan a/l Ananthan, deceased) v Datuk Seri Khalid bin Abu Bakar & Ors* [2014] 8 MLJ 625; [2013] 6 CLJ 272, holding as follows:

A [101] Although it was not so clearly stated, it is implicit from the said para 43 of its judgment that the Court of Appeal had also departed from the position of the law pronounced by the Federal Court in *Shaaban's case* in respect of these two provisions of the law. In our considered view, the appellants' reliance on the provisions of s 32 of the Police Act 1967 and s 14 of the Courts of Judicature Act 1964 is
B misconceived.

[102] In affirming the decision of the Court of Appeal, we are of the view that the facts as found by the Court of Appeal are peculiar and clearly distinguishable from the other cases which we have discussed, including the *Shaaban*'s case. The Court of Appeal had found that the strict requirements of the provisions of ss 117 and 119 of
C the CPC had not been complied with and further, there was a failure on the part of the police to be forthright in applying for the extension of the remand order to enable the magistrate to make an informed decision on the application. Thus, making the detention of the respondent unlawful. In *Shaaban*'s case, the detention following the magistrate's detention order was found to be lawful.

D

[72] The shield accorded by s 32(1) of the Police Act 1967 is thus not absolute, and may be vitiated where the police had failed to adhere to the requirements of law and where this breach had caused the magistrate to issue the remand order in question.

E

ANALYSIS AND DECISION

Arrest and detention up to 22 October 2020

F **[73]** As alluded to at para 56 ante, the fact that the plaintiff was only brought before a magistrate some 12 days after his arrest indicated that Inspector Jeintan had intended for the arrest to be effected pursuant to the Immigration Act 1959/63. Had this not been the case, the arrest would have contravened s 28 of the Criminal Procedure Code.

G

[74] It will be recalled that, immediately after the arrest of the plaintiff, Inspector Jeintan had filed the police report bearing the reference Port Dickson 4638/20. No mention was made in this report regarding the arrest having been
H effected under the Immigration Act 1959/63. It was only 16 days later that he filed a corrective report making reference to s 6(1)(c) of the Immigration Act 1959/63.

[75] However, the plaintiff had himself testified that he had been told after
I his arrest and while he was in the police car that he had been arrested because his social visit pass had expired. This supported the conclusion that the corrective report was not a mere afterthought and that Inspector Jeinthan had exercised his powers of arrest under the Immigration Act 1959/63.

[76] Despite this, I was nonetheless of the view that the arrest and the detention of the plaintiff were unlawful. The reasons are as follows:

(a) first, the plaintiff was not informed at the time of his arrest of the grounds for his arrest and detention. The evidence established at trial showed that the plaintiff was only told of the reasons of his arrest after he had been arrested, when he was in the car and being brought to IPK Seremban.
As explained, the law is very clear on the need to inform the arrested person of the grounds of his detention. The failure to do so amounts to a contravention of the constitutional protection accorded to the plaintiff under art 5(3) of the Federal Constitution, which reads as follows:

> (3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

This right of protection accrues even to non-citizens;

(b) second, the failure to inform the plaintiff at the time he was apprehended had deprived the plaintiff an opportunity to retrieve his passport, which would have established that he had validly entered the country.
Inspector Jeinthan's testimony was that the plaintiff had not complied with his request to produce his identification documents. For the reasons explained at para 19 et seq, ante, I found this to be improbable. The unchallenged testimony of PW1 was that the plaintiff's sling bag containing his passport was beside a chair in PW1's house. Had Inspector Jeinthan identified himself as a police officer and had the plaintiff been asked to produce his identification documents, then it was extremely unlikely that he would have had defied the request, given that the passport was within easy reach. The more probable truth was that the plaintiff was apprehended without explanation, and importantly, without a reasonable opportunity being afforded to him to produce his identification documents.
Put another way, Inspector Jeinthan could not have had a reasonable basis for his belief that an offence had been committed under the Immigration Act 1958/63 without first having given the plaintiff an opportunity to produce his passport before arresting him. It will be recalled that the plaintiff was initially arrested under s 6(1)(c) of the Immigration Act 1959/63, for having entered Malaysia without a valid pass. In order for Inspector Jeinthan to have formed the belief that an immigration offence had been committed, there must have been a failure by the plaintiff to produce his passport when asked. The evidence established at trial showed that, on balance, the plaintiff had not been afforded this opportunity. Even under the more generous subjective test under s 51(3)(a) of the Immigration Act 1959/63, a reasonable belief on the part of Inspector Jeinthan could not have existed;

(c) third, and perhaps most egregiously, was the fact that Inspector Jeinthan found it fit to exercise the power to arrest and detain the plaintiff in ignorance of the law.

As explained at para 3 *ante,* the plaintiff was stranded in Malaysia due to the government-imposed lockdown to curb the spread of the COVID-19 virus. He had validly entered Malaysia on a social visit pass, but could not leave before the expiry of the validity period of the visit pass.

The 19 March 2020 circular issued by the Director General of the Department of Immigration meant that all foreigners who became stranded in Malaysia due to the imposition of movement control orders could lawfully remain in Malaysia even though the validity period of their immigration passes may have expired.

When cross-examined by counsel, Inspector Jeinthan admitted that he in fact knew of the 19 March 2020 Department of Immigration circular at the time he arrested the plaintiff.

Yet, despite knowing of the circular, he had proceeded to arrest the plaintiff without giving him a reasonable opportunity to produce his travel documents, and had kept the plaintiff in detention because, according to his testimony at trial, the authenticity of the 19 March Department of Immigration circular needed to have been ascertained by the court (see p 157 of the notes of evidence).

If he knew of the existence of the 19 March 2020 circular, then surely the plaintiff ought to have been released from custody — at the very latest — on 20 October 2020 when confirmation was received that the plaintiff's passport and visa had been ascertained as genuine. Indeed, on the facts, I am of the view that the plaintiff ought not have been detained at all, if he had been accorded reasonable opportunity to produce his identification documents.

Yet, despite having received confirmation from the Immigration Forensic Centre of the Malaysian Immigration Academy that the passport and visa were genuine, and despite professing knowledge that he knew of the existence and effect of the 19 March 2020 circular at the time of the arrest, Inspector Jeinthan not only did not release the plaintiff from custody, but had proceeded to recommend that he be charged for contravention of s 15(1)(c) of the Immigration Act 1959/63.

It is the business of a police officer to know the law. If ignorance of the law accords an offender no excuse, then it must be doubly so for someone in whom it had been reposed the duty to enforce the law.

But here, Inspector Jeinthan professed to know the law. Yet his actions were inexplicable if this was indeed true. The only reasonable alternative conclusion must be that he had exercised his powers in furtherance of an undisclosed collateral purpose.

[77] At trial, evidence was received regarding irregularities in the manner in which investigations had been conducted, which hinted at the existence of such

a collateral purpose. The initial investigating officer assigned to the case, Inspector Roheswaran Ganesan ('DW1') agreed with the suggestion of counsel for the plaintiff that the investigation into the theft of the missing statute of the deity was under the jurisdiction of the IPD Seremban, and not IPK Seremban, where Inspector Jeinthan was stationed. However, there was no documentary evidence adduced at trial to show that there had been instructions for the investigations to be taken over by IPK Seremban.

[78] Inspector Roheswaran further testified that he was directed to hand over conduct of the investigation to Inspector Jeinthan, although in the trial documents there were no written directions exhibited. This in effect meant that Inspector Jeinthan was the arresting officer, the investigating officer, as well as the recording officer who had taken the statement from the plaintiff.

[79] I was of the view that the evidence adduced at trial fell short of proving the existence of a collateral purpose on the part of Inspector Jeinthan. In the final analysis, it was not necessary for the plaintiff to prove the existence of such a collateral motive to succeed in his case for unlawful arrest and detention against Inspector Jeinthan. Even absent such motive, the plaintiff has successfully established that his arrest and subsequent detention was unlawful.

Detention after 22 October 2020

[80] As explained at paras, 63 to 72 ante, the general rule is that no claim for unlawful arrest or false imprisonment may be made in respect of the period of detention after the arrested person has been charged in court. An important exception to the general rule is the principle established in *Hassan Marsom v Mohd Hady Ya'akop,* which is that the shield accorded by s 32(1) of the Police Act 1967 may be vitiated where the police there had failed to adhere to the requirements of law that had led or caused the remand order being issued by the court.

[81] On the facts of the present case, I was of the view that the exception to the general rule did not apply, as the existence of the 19 March 2020 circular had been brought to the attention of the court. There was thus an intervening act in the chain of causation. No further elaboration will be necessary for the present purposes, as no appeal has been lodged by the plaintiff against my determination.

[82] In summary, while the plaintiff succeeded in establishing unlawful arrest and detention up to 22 October 2020, no liability lay with Inspector Jeinthan in connection with the plaintiff's detention after that date.

Misfeasance in public office

[83] The pleaded case advanced on behalf of the plaintiff included the cause of action for misfeasance in public office. I was of the view that this cause of action was not made out on the facts.

[84] The case that represents the *locus classicus* on the tort of misfeasance in public office is the decision of the House of Lords in *South Bucks District Council v Porter; Chichester District Council v Searle and others; Wrexham County Borough Council v Berry* [2003] 3 All ER 1. The plaintiffs were some 6,000 depositors who had lost money in the collapse of Bank of Credit and Commerce International SA (BCCI) in 1991. The plaintiffs sought to make the Bank of England, as the regulatory authority supervising deposit-taking institutions, liable for misfeasance in public office by granting a licence to BCCI and by failing to revoke such licence when it became apparent that BCCI would collapse. Lord Steyn described the ingredients of the tort of misfeasance in public office as comprising the following:

(a) the defendant must be a public officer;

(b) there must have been an exercise of power as a public officer;

(c) as regards the state of mind of the defendant, there must either have been:

(i) targeted malice by the public officer, ie conduct specifically intended to injure the plaintiff. The bad faith here involves the exercise of a public power for an improper or ulterior motive; or

(ii) knowledge by the public officer that he has no power to carry out the act complained of and that the act will injure the plaintiff. The bad faith arises in this case because the officer does not have an honest belief that his act is lawful.

(d) there must have been a duty owed by the defendant to the plaintiff. Here, the plaintiff must show sufficient legal interest to found a legal standing to sue. Proximity need not be established;

(e) there must be causation between the acts complained of and the damage suffered by the plaintiff; and

(f) the plaintiffs must have suffered damage that are not too remote. The test for remoteness of damage was expressed in the following terms: the plaintiff must establish either that the defendant acted in the knowledge that his act would probably injure the plaintiff or a person in a class of which the plaintiff was a member, or that the defendant did not care whether his acts would have such a consequence. This is stricter than the test of reasonable foreseeability applicable in negligence cases.

[85] I was of the view that the mens rea element for the cause of action for misfeasance in public office was not proven.

[86] As explained in paras 77 to 79 ante, the contention of ulterior motive was not established. Be that as it may, the plaintiff could still succeed if it could be shown that Inspector Jeinthan did not have an honest belief that the act of arrest was lawful.

[87] I found that the facts established in this case fell shy of proving this element of the cause of action. While I was satisfied that Inspector Jeinthan did not have a reasonable basis for holding the belief that an immigration offence had been committed, I was also of the view that the facts did not prove that that belief was not honestly held. Put another way, the element of mala fides, a requisite to be proven under para 84(c)(ii) above, was not established.

[88] Although I disallowed the claim for misfeasance in public office, the damages that would have been payable under this cause of action would not have been any different from the action for unlawful arrest and detention.

Vicarious liability

[89] The court found the sixth defendant, the government of Malaysia, vicariously liable for the acts of the Inspector Jeinthan.

[90] In *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal* [2018] 3 MLJ 281; [2018] 1 AMR 209; [2018] 3 CLJ 427; [2018] 1 MLRA 535, the Federal Court expressed the test for vicarious liability in the following terms:

> [T]he test for imposing vicarious liability on a defendant (D2) for the tortious act of a tortfeasor (D1) comprises two stages:
>
> (i) the relationship between D1 and D2 must be one of employment or sufficiently akin to employment; and
>
> (ii) there must be a sufficiently close connection between that relationship and D1's tortious act.
>
> [112] The determination of a relationship of employment (or akin to employment) at stage 1 requires a consideration of multiple factors. In this exercise, the degree of control exercised by D1 over D2 is an important, albeit non-determinative, factor.

[91] In the present case, there was no question that Inspector Jeinthan was a police officer and hence the employment relationship with the government was proven.

[92] The 'close connection' test was considered and applied by the Federal Court recently in the case of *GMP Kaisar Security (M) Sdn Bhd v Mohamad Amirul Amin bin Mohamed Amir* [2022] 6 MLJ 369; [2022] 10 CLJ 669. The court explained the four features of the test that must be fulfilled:

A [31] In our considered opinion, and after considering the prevailing law we have set out in the foregoing discussion, the scope of vicarious liability in a case where the employee committed an intentional wrong is underpinned by the following common denominators:

B (i) the intentional wrong must be committed by the employee in the course of employment;

(ii) there must be connection between the wrongful act and the nature of the employment;

C (iii) the nature of the employment is such that the public at large are exposed to risk of physical or proprietary harm; and

(iv) the risk is created by the employer, owing to the features of the business.

D **[93]** I have no hesitation to find that, on the facts of the present case, there was a sufficiently close connection between the position of Inspector Jeinthan and the wrongful conduct that he had committed to make it just that the government be made liable for his acts. The arrest had been undertaken by Inspector Jeinthan in the course of his employment. There was a clear connection between the arrest and the nature of his employment, as the arrest E had been undertaken in exercise of his powers of investigations conferred upon an officer of the Royal Malaysian Police. The third element has also been clearly fulfilled, as the danger to the public of police powers exercised in excess needs little elaboration. Finally, this risk is clearly one that is inherent in government, and adequate safeguards must exist, not only in the form of adequate laws, but F also in putting in place controls and oversight to prevent the abuse of police powers.

[94] I was unable to discern serious conviction in the arguments raised to oppose the contention of vicarious liability on the part of the government. G There were two principal points put forth: first, that liability must first be proven against Inspector Jeinthan, before the government may be made vicariously liable. This submission was undeniably correct. As I have found liability on the part of Inspector Jeinthan, this requirement has been fulfilled.

H **[95]** Second, it was advanced for the defendants that Inspector Roheswaran had not been named as a defendant in the action, and therefore based on the principles established in the Federal Court case of *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1; [2009] 1 CLJ 663, liability cannot attach against the government. I must confess that I was unable to follow the I reasoning advanced. Clearly, the case of *Lay Kee Tee* prohibits a plaintiff from making a claim against the government without naming the specific tortfeasor as a party in the action. However, this requirement has been fulfilled in the present case, as Inspector Jeinthan has been made a defendant. Misconduct alleged against Inspector Roheswaran, if any, clearly did not form any part of

the causes of action advanced in this case. This did not have any effect on the incidence or extent of the government's liability for the actions of Inspector Jeinthan.

[96] The case against the other defendants was dismissed. As no appeal was lodged by the plaintiff against the dismissal of this part of the claim, I do not propose to deal with my reasoning for this determination, except to state that the case against the other defendants was not made out whether on the basis of principal liability or vicarious liability.

Damages

[97] Mr Karthig Shan for the plaintiff referred the court to a number of authorities where damages were awarded for unlawful arrest and detention, and suggested an amount of RM15,000 per day as fair and reasonable compensation.

[98] In the unreported case of *Azrul Hardav bin Abdullah v Norazman bin Mat Zim* (WA-21NCVC-131–12 of 2017) (unreported) , Mohd Firuz Jaffril J held as follows:

> I am also of the view that the Plaintiff had suffered the loss of his liberty unlawfully. The deprivation was done in a manner contrary to the protection provided under art 5(3) and (4) of the Federal Constitution. Guided by award made in the case of *Tan Sri Norian Mai & 0rs v Chua Tian Chang & Ors* [2015] 4 MLJ 464 where the court awarded RM10,000 per day for loss of liberty, based on the current economic conditions of today, I am of the view that a sum of RM15,000 per day from 9–12 January 2017 is reasonable and adequate (note: the plaintiff was released from custody on 13 January 2017).
>
> See also the case of *Hassan bin Marsom and Ketua Polis Negara & Ors v Nurasmira Maulat bt Jaafar & Ors and other appeals.*

[99] I agreed with Mr Karthig Shan's submission, and awarded RM15,000 per day for the 12 days of unlawful detention as general damages payable. The total general damages payable was thus RM180,000.

[100] The plaintiff also claimed for exemplary damages.

[101] The principles to be applied in determining whether exemplary damages ought to be allowed are explained in the following passage of the judgment of the Court of Appeal in the case of *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784:

> [32] Now, aggravated damages are classified as a species of compensatory damages, which are awarded as additional compensation where there has been intangible

injury to the interest of personality of the plaintiff, and where this injury has been caused or exacerbated by the exceptional conduct of the defendant.

[33] The exemplary damages or punitive damages — the two terms now regarded as interchangeable — are additional damages awarded with reference to the conduct of the defendant, to signify disapproval, condemnation or denunciation of the defendant's tortious act, and to punish the defendant. Exemplary damages may be awarded where the defendant has acted with vindictiveness or malice, or where he has acted with a 'contumelious disregard' for the right to the plaintiff. The primary purpose of an award of exemplary damages may be deterrent, or punitive and retributory, and the award may also have an important function in vindicating the rights of the plaintiff (see *Rookes v Barnard* [1964] 1 All ER 347; *AB and others v South West Water Services Ltd* [1993] 1 All ER 609, *Broome v Cassell & Co Ltd and Another* [1971] 2 QB 354, Laksamana Realty Sdn Bhd v Goh Eng Hwa and another appeal [2006] 1 MLJ 675; [2005] 4 CLJ 871).

[102] Accordingly, there must have been some exceptional conduct on the part of the defendant before exemplary or aggravated damages would be awarded to a plaintiff. The case of *Rookes v Barnard* [1964] AC 1129 restricted exemplary damages to the following three situations:

(a) where they are recognised by statute;

(b) where the wrong involves oppressive, arbitrary or unconstitutional actions by agents of the government; and

(c) where the defendant's tortious act has been done with guilty knowledge, for the motive that the chances of economic advantage outweigh the chances of economic or perhaps physical penalty.

[103] In my considered judgment, the circumstances of the case described at para 76(c) ante sufficiently justified the award of exemplary damages. The arrest had not been effected on the basis of an innocent mistake, nor based upon an honest belief on reasonable grounds that an immigration offence had been committed. Had an opportunity been given to the plaintiff, I have no doubt that he would have been able to produce his passport to Inspector Jeinthan. Even then, had Inspector Jeinthan entertained further doubts on the authenticity of the passport and visa, checks could have been made without the need to arrest the plaintiff and to place him in custody for 12 days. Most egregiously, Inspector Jeinthan professed to know of the existence and effect of the 19 March 2020 Department of Immigration circular, but yet proceeded to recommend that the plaintiff be charged with the offence of overstaying when clearly general permission to remain in Malaysia had been granted to nonresidents due to the COVID-19 pandemic and due to the ensuing imposition of movement control orders. At the most generous, Inspector Jeinthan was ignorant of the law. At worst, the evidence at trial hinted at some collateral motive, if his own evidence that he was aware of the existence of the 19 March 2020 circular was to be believed. Either way, the second of the three

circumstances in *Rookes v Barnard* has been fulfilled.

[104] I assessed exemplary damages at 25% of the restitutive damages awarded. I drew guidance from the following passage in the Court of Appeal decision in *Sin Heap Lee-Marubeni Sdn Bhd v Yip Shou Shan* [2005] 1 MLJ 515:

> 48. There is no fixed formula or rate in awarding exemplary damages. In the present appeal, the trial judge awarded the sum of RM900,000. In his judgment the learned judge stated that he followed the formula in *Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1993] 1 MLJ 443 where the court awarded exemplary damages of about 25% of the compensatory damages assessed. In the present appeal the compensatory damages by the learned judge was RM3.2m and 25% of that would be RM900,000. That was how the learned judge arrived at the figure. I see no reason to disturb the award made by the learned judge.

[105] Accordingly, I assessed exemplary damages to be RM45,000, making the total damages payable to the plaintiff to be RM225,000. I ordered that the liability of the fifth and sixth defendants for such damages and for costs of the action to be joint and several.

CONCLUSION

[106] For as long as the law devolves upon a person the power to make a decision in the public sphere, then the exercise of that power should be made the subject of legal control, on the basis that such a power must be exercised for a proper purpose and must not be exercised in excess. The words of Raja Azlan Shah CJM (as His Royal Highness then was) in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 serve as a salutary reminder of the beholden duty of the courts in adjudicating cases involving the exercise of powers by officers performing a public function:

> Every legal power must have legal limits, otherwise there is dictatorship. In particular, there is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene.

Claim allowed in part.

Reported by Nabilah Syahida Abdullah Salleh